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[COURT OF APPEALS NO. 61226-3-I]

SUPREME COURT
OF THE STATE OF WASHINGTON

JERRY D. SMITH, as Personal Representative of the ESTATE OF BRENDA L. SMITH, Deceased, and on behalf of JERRY D. SMITH, RICHONA HILL, JEREMIAH HILL, and the ESTATE OF BRENDA L. SMITH,

Plaintiff/Petitioner,

v.

ORTHOPEDICS INTERNATIONAL LIMITED, PS; and PAUL SCHWAEGLER, MD,

Defendants/Respondents.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Jerry D. Smith, as Personal Representative of the Estate of Brenda L. Smith, deceased, and on behalf of Jerry D. Smith, Richona Hill, Jeremiah Hill, and the Estate of Brenda L. Smith, asks this Court to accept review of the Court of Appeals decision terminating review designed in Part B of this petition.

B. COURT OF APPEALS DECISION

Discretionary Review of the Court of Appeals, Division I decision Jerry D. Smith, Appellant v. Orthopaedics International, Respondent, No. 61226-3-I filed March 23, 2009. A copy of the decision is in the Appendix at pages A-1 through 7.

C. ISSUES PRESENTED FOR REVIEW

1. Is it a violation of Loudon v. Mhyre, 110 Wn.2d 675, 756 P.2d 138 (1988), for defense counsel to send Plaintiffs' Trial Brief, trial testimony of plaintiffs' vascular surgery expert, and a proposed outline of direct testimony and expert witness topics to a nonparty treating physician through the treating physician's personal attorney?

2. Whether a violation of a pretrial motion in limine or an ER 615 Motion to Exclude Witnesses is a requirement for a Loudon v. Mhyre violation where defense counsel provides trial testimony, trial documents

and an outline of direct testimony to a testifying nonparty treating physician?

3. What is the appropriate remedy for an in-trial Loudon v. Mhyre violation?

D. STATEMENT OF THE CASE

1. INTRODUCTORY FACTS.

Jerry Smith is the surviving spouse and personal representative of the estate of Brenda Smith. He brings this action in his representative capacity on behalf of Brenda Smith's estate, her surviving children, Richona Hill and Jeremiah Hill, and himself. Defendant Paul Schwaegler, MD, is a board-certified orthopedic surgeon specializing in back surgery and is a member and/or partner of Orthopedics International Limited, PS. Brenda Smith died as a result of infection following multiple surgeries and amputations following failure to properly monitor circulation in the lower extremities.

2. MEDICAL FACTS.

The basic medical facts concerning Brenda Smith's multiple surgeries and death are not in dispute. Brenda Smith underwent a repeat back operation by Dr. Paul Schwaegler on December 31, 2003, which lasted a total of 9.5 hours. (RP 11/06/07, p. 106.) Dr. Schwaegler's

handwritten operative note listed no complications. (RP 11/20/07, pp. 108, 109.)

At 2340 on January 1, 2004, Nurse Cummons notes Brenda's left foot is cold and there are no pulses present by Doppler examination. (Ex. 11.) Nurse Cummons first contacts the staff hospitalist, Dr. Sachdeva, and then calls Dr. Khalfayan at approximately 1:00 am. (Ex. 11; RP 11/07/07, p. 114.) Dr. Sachdeva was unable to feel either the femoral, popliteal or dorsalis pedal pulses and diagnosed an arterial out-flow problem. (RP 11/20/07, p. 126.) Brenda's left foot was cooler than her right. The left foot was cold and blue. (RP 11/20/07, p. 126.) Dr. Schwaegler considered Brenda's exam to be "grossly different" from the afternoon. (RP 11/20/07, pp. 126, 127.) Dr. Schwaegler called Dr. Kaj Johansen for a vascular surgery consult. (RP 11/20/07, p. 125.) Dr. Johansen performed a left retroperitoneal transaortic thrombectomy without success. (Ex. 58; RP 11/14/07, p. 76.) Brenda Smith endured multiple additional procedures in an attempt to save her lower extremities. Brenda contracted MRSA (Methicillin Resistant Staphylococcus Aureus) (RP 11/08/07, p. 178) and underwent a through the knee amputation. (RP 11/14/07, p. 78) Brenda Smith died of MRSA pneumonia. The MRSA infection present at the time of her death was contracted during her 2004 hospitalization. (RP 11/08/07, p. 187)

3. DR. JOHANSEN'S TRIAL TESTIMONY.

On November 14, 2007, Dr. Kaj Johansen testified. He was called as a witness for the defense and was examined by attorney Clarke Johnson. (RP 11/14/07, p. 9.) Dr. Johansen acknowledged his first involvement was at approximately 1 am on January 2, 2004. (RP 11/14/07, p. 14.) Dr. Johansen went through in detail his initial consultation note (Ex. 55). (RP 11/14/07, p. 15.) Dr. Johansen's initial plan was to perform an aortogram. (RP 11/14/07, p. 16.) Dr. Johansen described and explained his embolectomy procedure. (RP 11/14/07, pp. 19-20.) Dr. Johansen described a fasciotomy and testified that a fasciotomy was not performed at this initial procedure because it was his understanding that the arterial occlusion had been for a relatively short period of time. (RP 11/14/07, pp. 22-23.) Dr. Johansen testified that, in hindsight, he would not have performed the aortogram and would have performed the fasciotomy earlier in the morning on January 2, 2004. (RP 11/14/07, pp. 33, 34.) Dr. Johansen was then asked a hypothetical question regarding his course of action had he been called at noon on January 1, 2004. Plaintiffs' counsel objected. A sidebar conference was held and the court requested that the sidebar be put on the record. *See* Transcript 11/14/07, pp. 35-44. Mr. Otorowski argued that the question posed was an expert question where he had not been designated as an

expert witness to answer such questions, especially in the present case where defendants have identified Dr. Samer Saiedy, who, unlike Dr. Johansen, would have performed a fasciotomy earlier in the morning and would have been able to save Brenda Smith's leg. (RP 11/14/07, pp. 37-38.) The court reasoned that it was not helpful to the jury to hear a treating physician speculate about what he would have done at a point in the case when he actually was not called in. (RP 11/14/07, pp. 40-41.) The court sustained plaintiffs' objection. (RP 11/14/07, p. 44.)

Dr. Johansen was then immediately asked about arterial flow dynamics, a topic specifically addressed by plaintiffs' expert, Dr. Cossman. When asked a question regarding the timing of the aortic thrombus in Brenda Smith, Dr. Johansen greatly expanded his answer by adding the additional statement:

> I believe that it was not significant, in terms of blocking blood supply, until there started being signs at the bedside of a problem, for example, a cool foot, pulses which initially could be felt with the fingers but no longer could be felt, it was still at that point, I believe that the blockage became really significant.

(RP 11/14/07, p. 47.) Plaintiffs' counsel again immediately objected to seeking expert opinions prior to Dr. Johansen's involvement. (RP 11/14/07, p. 47.) The court sustained the objection and struck the quoted portion of the answer. (RP 11/14/07, p. 48.)

On redirect, Dr. Johansen was again asked his opinion regarding an Ankle-Brachial Index (ABI) performed midday on January 1, 2004. (RP 11/14/07, p. 84.) This question was again objected to and the court sustained the objection. (RP 11/14/07, p. 84.) Dr. Johansen was again asked to comment on the believability of the ICU nurses checking Brenda Smith's pedal pulses on January 1st prior to Dr. Johansen's involvement:

> Q. So if a nurse in this case testified that she was able to either palpate or find Doppler pulses at eight a.m., 10:00 a.m., 11:30, and 3:00, based on your experience with trained ICU nurses at Swedish Hospital, would you have any reason to believe that they were not accurately reporting what they were finding?
>
> MR. OTOROWSKI: Your Honor, I object. First of all, there's no reference in the medical records to good pulse, good color, normal temperature, as we've already established. Again, this witness has no factual information as to what went on then, he doesn't know what the nurses' testimony was. One of the nurses, Nurse Hanson, says she does not have any idea what monophasic, biphasic, and multiphasic even meant.
>
> MR. JOHNSON: Your Honor, the specific testimony of Nurse Hanson is that she's trained to check –
>
> THE COURT: I recognize that. We're talking about what this witness can testify about. Sustained, but it may be because you can rephrase.
>
> Q. (BY MR. JOHNSON) Doctor, do you routinely rely on your practice as a vascular surgeon at Swedish Hospital on the ability of the nurses in the ICU to accurately be able to determine whether your patients have normal pulses?
>
> MR. OTOROWSKI: Objection, asked and answered, Your Honor.
>
> THE COURT: He may answer.

A. I do.

Q. (BY MR. JOHNSON) Can you explain that for us, please.

A. Yes. I think your question was can I count on the nurses' expertise, training and expertise and understanding, to give me dependable information, information that I can trust, in terms of decision-making. The answer is yes, and it is because, among other things, I have personally trained them in the use of the Doppler, and the reasons that it needs to be used, in addition to physical examination, feeling for pulses, and so forth. So it is because I – personally, I and other vascular surgeons have trained them, and because our body of experience over years has suggested that the – their findings are trustworthy, that I myself look upon them as being trustworthy.

(RP 11/14/07, pp. 85-87.)

Defense counsel also made an offer of proof regarding a hypothetical question of the Ankle Brachial Index (ABI) performed earlier in the day on January 1st. (RP 11/14/07, p. 99.) During the cross-examination phase of the Offer of Proof, Dr. Johansen confirmed that at the time of his deposition he had not reviewed the inpatient record, and was represented by counsel at the deposition. (RP 11/14/07, p. 102.) Dr. Johansen specifically denied that anyone from defense counsel's office had been in contact with him.

4. NOVEMBER 19, 2007 HEARING.

Following Dr. Johansen's testimony, plaintiff requested an evidentiary hearing to investigate the circumstances of Dr. Johansen's being provided Plaintiffs' Trial Brief, Dr. Cossman's trial testimony and

any other pre-testimony contact between Dr. Johansen and defense counsel. (ER 148-153.) Over the weekend the parties' counsel hired counsel, and the trial court conducted telephone conferences with all counsel, including counsel for Dr. Johansen. On November 19, 2007, the trial court conducted a hearing regarding Dr. Johansen's testimony.[1] The court declined a full evidentiary hearing as requested by plaintiffs, but through the weekend conference calls and representations of counsel at the November 19, 2007 hearing, it was established that:

- Plaintiffs' Trial Brief was sent at Mr. Graffe's request to Dr. Johansen's attorney, Rebecca Ringer, for forwarding to Dr. Johansen (RP 11/19/07, p. 48);
- Mr. Graffe took the initiative to send the trial testimony of Dr. Cossman to Ms. Ringer for Dr. Johansen's review (RP 11/19/07, pp. 47, 50, 51);
- An undisclosed item, which was claimed to be attorney work product, was also sent to Ms. Ringer for Dr. Johansen's review (RP 11/19/07, p. 48). After the December 19, 2007 denial of Plaintiffs' Motion for New Trial, plaintiffs first became aware that this

[1] Attorney Charles Wiggins appeared specially for plaintiffs; attorney Elizabeth Leedom appeared specially for defendant.

"undisclosed" item was attorney Clarke Johnson's outline for his direct examination of Dr. Johansen.

The trial court expressed serious concerns regarding the candor of defense counsel, but did not consider there to be a Loudon violation "as the law currently stands." The court stated:

> So it may be that an appellate court will see fit to expand Louden [sic] to cover any contact, whether it's in the discovery context or not, but heretofore it does not appear to me that Louden [sic] goes that far, and so I am sympathetic to and I think that I need to address the plaintiffs', I think, genuine surprise, under these circumstances, about Dr. Johansen having received that testimony.
>
> But I do not think that it was misconduct, under these circumstances, to share the transcripts with Dr. Johansen, or his counsel, I should say, and it was not a violation of a court order, and at least as the law currently stands, I don't believe it was a violation of the law. So I think some of the more drastic remedies that have been suggested by the plaintiffs, such as striking Dr. Johansen's testimony, are not appropriate under those circumstances. However, I do recognize that they were completely surprised by Dr. Johansen having read Dr. Cossman's testimony, presumably, and there was a discussion during his testimony at sidebar, in chambers, where Mr. Otorowski made it very clear that he was quite concerned that Dr. Johansen had information and had had contact with defense counsel in some way, and he was told that defense counsel had not spoken to Dr. Johansen, which was technically true, but I think that it certainly led the court to believe that there hadn't been any communication between defense counsel and Dr. Johansen in his – and/or his attorney, and at least for the time being I think it led plaintiffs counsel to believe that, and that really wasn't the situation.

> This information had been transmitted, and I think, in all candor, probably should, under those circumstances, have been disclosed to the plaintiffs.
>
> In light of that, I think we have to figure out what is the most appropriate way to be fair to the plaintiffs under these circumstances, and I've thought about a couple of different remedies. One would be calling Dr. Johansen back for further cross-examination, and there are some probably parameters that we would have to devise. Another would be a jury instruction.

(RP 11/19/07, pp. 61-63) (emphasis added).

The trial court did not allow plaintiffs' counsel to review the emails or the proposed testimony outline for Dr. Johansen's direct examination (RP 11/19/07, pp. 79-80). The emails and testimony outline were held under seal and only released to plaintiffs by the trial court after the jury verdict (RP 11/19/07, pp. 80-81).

On November 20, 2007, the trial court denied Plaintiffs' Motion for Mistrial (RP 11/20/07, p. 4); declined plaintiffs' proposed curative jury instructions (RP 11/20/07, pp. 8, 12); and, fashioned the Court's Instruction No. 8 (ER 209). Plaintiffs properly and timely objected to the giving of Instruction No. 8 (RP 11/21/07, pp. 132-133).

The jury found for Dr. Schwaegler and Orthopedics International Limited and returned a defense verdict.

E. MULTIPLE GROUNDS ARE PRESENT FOR GRANTING DISCRETIONARY REVIEW

1. THE DECISION IS IN CONFLICT WITH THE SUPREME COURT DECISION OF *LOUDON V. MHYRE*, 110 WN.2D 675, 756 P.2D 138 (1988).

In Loudon, the Supreme Court held that defense counsel may not engage in ex parte contact with the plaintiff's treating physician. Id. at 675-676. Defense counsel's contact with the treating physician is limited to formal discovery methods provided by court rule. Id. at 676. For over thirty years, Loudon has been a bright line rule in personal injury litigation. The Division I decision in Smith destroys any notion of a "bright line rule" and permits defense counsel to unilaterally contact treating physicians, providing the physician with unsolicited and unrequested litigation information in order to become a more effective trial witness against the patient. If the ex parte contact is discovered, the trial court is now forced to perform a retrospective analysis to determine prejudice. The conflict between Loudon and Smith is grounds for discretionary review. RAP 13.4(b)(1).

Under the clear holding of Loudon, litigators knew that the testimonial knowledge base of a treating physician was based on the physician's knowledge derived solely from factual observations and opinions as to what happened while under the physician's care. Peters v. Ballard, 58 Wn. App. 921, 930, 795 P.2d 1158 (1990). The Division I

Smith opinion not only negates the Loudon bright line rule, but also opens the door to multiple unsolicited and unmonitored defense counsel contacts, calculated to expand the treating physician's knowledge base beyond that of a "treating physician" to an undisclosed CR 26(b)(5) expert witness.

Petitioner respectfully submits that under Loudon, defense counsel would not have been permitted to have ex parte contact with Dr. Johansen to provide him with Plaintiffs' Trial Brief, expert trial testimony and an outline of direct testimony and expert witness topics. Under Loudon, defense counsel must not be allowed to accomplish indirect ex parte contact through a conduit. What defense counsel may not accomplish directly, defense counsel must not be allowed to accomplish indirectly.

In the present case, Division I significantly misconstrued the facts in reaching its flawed decision. For instance, it is undisputed that it was plaintiffs' counsel that moved for a mistrial – not defense counsel (RP 11/20/07, p. 4) (See Smith opinion, p. 3). Second, the Court's suggestion that "[t]here was no evidence in the record that Dr. Johansen had ever received defense counsel's notes for his upcoming direct examination" (See Smith opinion, p. 3) completely ignores the fact that the trial court refused to allow plaintiffs to conduct an evidentiary hearing and, more importantly, the trial court refused to allow plaintiffs' counsel to even know the contents of the emails and the direct testimony outline (RP

11/19/07, p. 80).[2] The emails and the direct testimony outline were never made available to plaintiffs' counsel until after the defense verdict (RP 11/19/07, pp. 80-81).

Under such circumstances, the suggested limited remedy of cross-examination of Dr. Johansen served no purpose if plaintiffs' counsel were not allowed to review the ex parte communication to Dr. Johansen.

2. THE COURT OF APPEALS, DIVISION I *SMITH* DECISION IS IN CONFLICT WITH THE COURT OF APPEALS, DIVISION III CASE OF *ROWE V. VAAGAN BROS. LUMBER, INC.* 100 WN.APP. 268, 996 P.2D 1103 (2000).

A conflict between Division III in Rowe and Division I in Smith establishes a separate and independent basis for Supreme Court discretionary review under RAP 13.4(b)(2). Rowe involved a wrongful termination claim and a situation where defense counsel conducted ex parte interviews with two treating physicians prior to their depositions. At trial, the jury returned a defense verdict. Division III held that, as a matter of law, defense counsel's violation of the discovery rules required that the trial judge should grant a new trial. Rowe at 278. Division III stated unambiguously that ex parte communication with a treating physician who testifies not as an expert but as a fact witness is prohibited as a matter of

[2] It is merely assumed that Dr. Johansen was never provided the testimony outline since emails do not specifically reference its delivery even though defense counsel's clear intent was to guide Dr. Johansen's testimony. Plaintiffs were never allowed to examine Dr. Johansen on this issue and the court declined to provide the outline to plaintiffs' counsel until after the jury verdict.

public policy. Rowe at 278, quoting Loudon v. Mhyre, 110 Wn.2d 675, 677, 756 P.2d 138 (1988). Further, in considering a remedy, Division III concluded that the appropriate remedy is not just a new trial but also precluding the defense from using the testimony of the contacted physicians. Rowe at 279. Division III and Rowe do not permit any end run around in Loudon while Division I now allows unsolicited ex parte contact without any notice to the plaintiff's counsel.

3. THE COURT OF APPEALS, DIVISION I *SMITH* DECISION INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST WHICH SHOULD BE DETERMINED BY THE SUPREME COURT.

The Smith decision involves issues of substantial public interest, which establishes a third independent basis for direct review. RAP 13.4 (b)(4). The issue of a defense counsel's ex parte contact with opposing party's physician is a matter of public policy. The Loudon decision was based upon public policy. [We hold that ex parte interviews should be prohibited as a matter of public policy.] Id. at 677. As stated previously, the Division I Smith decision essentially overturns Loudon to where ex parte contact is allowed, defense counsel can provide additional litigation information to the treating physician and the plaintiff's counsel and trial court need not know of this attempt to transform a treating physician to an expert physician. If discovered, then plaintiff's counsel has the burden of proof of establishing prejudice.

The Smith decision suggests that "the better course of conduct" would be for defense counsel to copy plaintiff's counsel on the emails. This utopian suggestion will never occur when this ex parte contact and the sharing is now approved by Division I. The Supreme Court should be greatly troubled of defense counsel's lack of candor which Division I does not even impose upon defense counsel. The Supreme Court should also be greatly troubled by the impact of the Smith decision on the fairness of all types of injury litigation as well as the intrusions into the livelihood and practice of treating physicians.

F. CONCLUSION

Defense counsel's sending Plaintiffs' Trial Brief, trial testimony and defendant's trial testimony outline for Dr. Johansen's testimony through Dr. Johansen's personal attorney must be viewed as prohibited ex parte contact. What defense counsel may not do directly, they cannot do indirectly. The bright line rule of prohibiting defense counsel ex parte contact exists regardless of a specific pretrial motion in limine or an ER 615 motion to exclude witnesses. Under Rowe, the appropriate remedy is the granting of a new trial and the exclusion of Dr. Johansen's testimony at re-trial. Petitioner Smith respectfully submits there are multiple and independent grounds for direct review of the Court of Appeals, Division I decision of Smith v. Orthopedic International, Ltd., PS, et al.

Respectfully submitted this 21 day of April, 2009.

Otorowski Johnston Diamond & Golden

Thomas K. Golden, WSBA #11040

Christopher L. Otorowski, WSBA #8248

CERTIFICATE OF SERVICE

I certify that on the 21st day of April, 2009, I caused a true and correct copy of the foregoing document to be served on April 22, 2009 on the following counsel of record by ABC Legal Messenger Services:

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Dated this 21st day of April, 2009, at Bainbridge Island, Washington.

Sara Davis
Legal Assistant to Thomas R. Golden, Esq.

Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JERRY D. SMITH, as Personal Representative of the ESTATE OF BRENDA L. SMITH, Deceased, and on behalf of JERRY D. SMITH, RICHONA HILL, JEREMIAH HILL, and the ESTATE OF BRENDA L. SMITH, Appellant, v. ORTHOPEDICS INTERNATIONAL, LIMITED, P.S.; PAUL SCHWAEGLER, M.D.; and SWEDISH HEALTH SERVICES d/b/a SWEDISH MEDICAL CENTER/PROVIDENCE CAMPUS, Respondents.	)	No. 61226-3-I DIVISION ONE PUBLISHED OPINION FILED: March 23, 2009

GROSSE, J. — Prohibited ex parte contact as described in Loudon v Mhyre[1] does not apply to transmittal of public documents to an attorney representing a nonparty treating physician. The underlying public policy enunciated in Loudon was to protect the patient's privacy from release of any extraneous medical information not germane to the issue at trial. Here, there was no such risk as no information was sought in return from the physician and the information given to the witness was public information. The trial court is affirmed.

[1] 110 Wn.2d 675, 756 P.2d 138 (1988).

FACTS

This is a medical malpractice, wrongful death and survival action brought by Jerry Smith, the surviving spouse and personal representative of Brenda Smith's estate, against Dr. Paul Schwaegler and his employer, for negligent postoperative care following spinal surgery.[2] Brenda Smith suffered from long-standing back problems which led to her consulting Dr. Schwaegler, an orthopedic surgeon employed by Orthopedics International Limited, P.S. On December 31, 2003, Brenda Smith underwent surgery to reconstruct her spinal column. Dr. Schwaegler performed the surgery along with Dr. Andrew Ting, whose task was to provide access to the lumbar vertebrae.

After the 9.5 hour surgery, Brenda was transferred to recovery where no complications were noted. She was then transferred to the intensive care unit. In the early morning hours of January 2, 2004, a blood clot was discovered in Brenda's aorta. A few hours after the clot's discovery, Dr. Kaj Johansen, a vascular surgeon, removed the clot from Brenda's aorta. Due to continuing postoperative complications, Brenda underwent multiple surgeries, including partial amputation of her left leg. During this time period, she was attended to by multiple doctors including Dr. Schwaegler and Dr. Johansen. In addition to the vascular problems, Brenda contracted methicillin resistant Staphylococcus aureus (MRSA), a serious infection. Brenda was eventually discharged from Swedish Hospital in April 2004. Brenda continued to have complications and

[2] Smith also brought a negligence claim against the nurses at Swedish Hospital, which settled before trial.

was readmitted for MRSA pneumonia, which resulted in her death in March 2005.

During pretrial discovery, Smith deposed Dr. Johansen who was subsequently called as a nonparty fact witness for the defense. Before trial began, a paralegal for the defense sent an e-mail to Rebecca Ringer, Dr. Johansen's attorney, in which she states that defense counsel would like Dr. Johansen to read the attached plaintiff's trial brief. Trial began on November 5, 2007. No motions in limine were made to restrict the witnesses. Smith called Dr. David Cossman as an expert in support of his negligence claim. On November 12, a copy of Dr. Cossman's trial testimony was transmitted to Ringer for Dr. Johansen to review. And on November 13, defense counsel's notes for Dr. Johansen's direct examination were sent to Ringer. On November 14, Dr. Johansen testified and it was then that Smith's counsel learned of these transmissions.

Defense counsel moved to strike Dr. Johansen's testimony and for a mistrial. The court held a hearing and denied the motion, finding no Loudon violation or other attorney misconduct, and further, that there was no prejudice to Smith. There was no evidence in the record that Dr. Johansen had ever received defense counsel's notes for his upcoming direct examination. The trial court offered Smith an opportunity to recall Dr. Johansen to cross-examine him and determine exactly which documents he had received. Smith declined to do so. The trial court further fashioned a jury instruction informing the jurors that

documents had been given to Dr. Johansen without the knowledge of the plaintiff.

After a two and a half week trial, the jury returned a verdict in favor of the defendants. On appeal, Smith contends that defense counsel had engaged in improper ex parte contact with Dr. Johansen—one of Brenda Smith's treating physicians and a defense witness—by providing Dr. Johansen's attorney with a copy of the trial testimony from Smith's vascular expert, plaintiff's trial brief, and an outline of proposed questions.

ANALYSIS

A trial court's denial of motions for mistrial and new trial are reviewed for abuse of discretion, and ultimately, whether the appellants were denied a fair trial.[3] Smith argues that the trial court should have struck Dr. Johansen's testimony because ex parte contacts with a treating physician are prohibited under Loudon v. Mhyre.[4] Essentially, he contends that Loudon established a bright line rule prohibiting all contact and deeming any prohibited contact prejudicial per se. We disagree.

Loudon involved a wrongful death action. There, the Supreme Court upheld the trial court's ruling that prehearing communications between defense counsel and the plaintiff's treating physician were not permitted, despite waiver of the physician-patient privilege, thus limiting defense counsel to formal discovery

[3] Aluminum Co. of America v. Aetna Cas. & Sur. Co., 140 Wn. 2d 517, 537, 998 P.2d 856 (2000); Kimball v. Otis Elevator Co., 89 Wn. App 169, 178, 947 P.2d 1275 (1997).
[4] 110 Wn.2d 675, 756 P.2d 138 (1988).

methods.[5] The Loudon court noted that the potential risk with such contact was that a physician may inadvertently disclose privileged information regarding a medical condition irrelevant to the litigation.[6]

After Loudon, counsel may not interview a plaintiff's nonparty treating physician privately but must instead utilize the statutorily recognized methods of discovery as set forth in the civil rules. Essentially, that is what occurred here. Dr. Johansen was deposed and his testimony at trial tracked the information obtained during that deposition. Without more, the transmittal of public documents to a fact witness who is also a treating physician does not fall within the ambit of Loudon. Indeed, given the public nature of the documents, excluding the notes, we do not see how it can be.

Smith relies on Rowe v. Vaagen Brothers Lumber, Inc.[7] to support his assertion that Loudon bars the ex parte contact in this case. In Rowe, the trial court granted the plaintiff's motion for a new trial because of an excessive number of objectionable questions by defense counsel, ex parte contact with treating physicians prior to their depositions, mistakes in editing one of the depositions, and misrepresentation of evidence during the defense's closing argument.[8] The trial court granted the motion for new trial because of the cumulative impact of the defects noting "'[i]f there were only one or two of these instances of meritorious CR 59 bases present, the court's decision on this motion

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[5] Loudon, 110 Wn.2d at 676.
[6] Loudon 110 Wn.2d at 680.
[7] 100 Wn. App. 268, 996 P.2d 1103 (2000).
[8] Rowe, 100 Wn. App. at 273.

may well have been different.'"[9] Here, unlike in Rowe, defense counsel did not seek or solicit information from Dr. Johansen or from his attorney. Rather, they sought to transmit largely public information to which Smith's counsel was already privy.

In Ford v. Chaplin,[10] this court held that for a Loudon violation to necessitate a new trial, there must not only be ex parte contact with the plaintiff's treating physician, but such contact must result in material prejudice to the plaintiff's case. Smith characterizes the three or four transmission e-mails and one or two voice mails to Dr. Johansen's attorney as multiple ex parte contacts. Such a characterization is misleading. The posttrial exhibits clearly indicate that the series of three or four e-mails were transmitted only to Dr. Johansen's attorney. In argument to the court, defense counsel stated they were doing nothing more than keeping Ringer apprised of the testimony and questioning as her client was technically at risk of being sued himself. While the better course of conduct would have been to copy opposing counsel on the e-mails, the transmission of the documents does not constitute a Loudon violation. Furthermore, there is no evidence in the record before us that Dr. Johansen ever received a copy of an outline of defense counsel's proposed questions. Asking Dr. Johansen's attorney to have him review the plaintiff's trial brief and the expert's testimony is not comparable to a Loudon violation.

But even if this court were to determine that such conduct amounted to a technical Loudon violation, there is no showing of prejudice to the plaintiff. There

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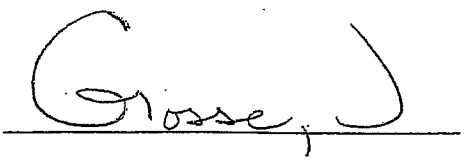
[9] Rowe, 100 Wn. App. at 274.
[10] 61 Wn. App. 896, 812 P.2d 532 (1991).

was no surprise in Dr. Johansen's testimony. Smith's counsel argues that the questions posed to Dr. Johansen required multiple objections from them, thus permitting the jury to infer that Smith was trying to hide exculpatory evidence. The trial court found no prejudice. Furthermore, Dr. Johansen's testimony paralleled his deposition and thus the receipt of this information did not "influence" his testimony.

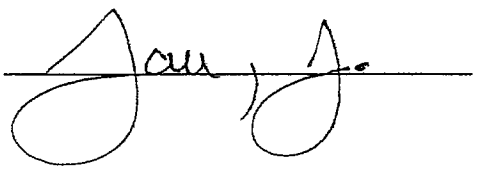
Smith's reliance upon other jurisdictions to support a bright line rule for granting a new trial where ex parte contact occurs is likewise inapposite. In McCool v. Gehret,[11] the defendant physician actually requested that a third party contact a physician witness to dissuade him from testifying. No such malicious intent was shown here.

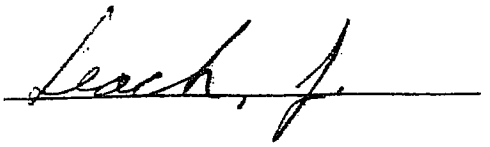
Smith has failed to make any compelling argument for reversal. The trial court was fair and did not abuse its discretion.

Affirmed.



WE CONCUR:





[11] 657 A.2d 269 (Del. Supr., 1995).